(4)

No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the President has the authority to imprison as an "enemy combatant" an American citizen seized on American soil outside a zone of combat.

2. Whether, if the President has such authority, (a) there are limitations on the circumstances in which such authority may be exercised and the length of time an individual may be imprisoned, and (b) the individual detained may challenge the President's assertion of that authority at a meaningful hearing with the assistance of counsel.

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No. 03-1027

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v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT

Respondent Jose Padilla and Donna R. Newman, as next friend of Jose Padilla, respectfully submit this opposition to the Petition for Certiorari.

STATEMENT

For almost two years, Jose Padilla, an American citizen seized on American soil outside a zone of combat, has been held incommunicado in a military prison. The sole basis for his detention is a presidential order declaring him to be an "enemy combatant" – a term not defined by any act of Congress, any federal regulation, or any treaty. Under the Government's theory, the President may declare any citizen within the United States to be an "enemy combatant," allowing the military to imprison the individual indefinitely (or until the "war on terror" is over) and to interrogate him without limit until the Secretary of Defense decides his "intelligence value" is gone. Under the Government's view, the Executive has virtually unbridled and unreviewable power to imprison

American citizens in the domestic arena – a proposition wholly at odds with our constitutional history and the rule of law on which our country is based.

The Petition should be denied. Jose Padilla has been imprisoned for almost two years. No criminal charges have been brought against him. He is not being held as a material witness. The Court of Appeals properly held that unless charges are brought or a material witness warrant is served, Padilla is legally entitled to be released. There is nothing in Article II of the Constitution, or in any federal statute, that gives the President the unilateral power to seize American citizens in the domestic arena based on the President's unreviewable declaration that they are "enemy combatants." The Court of Appeals properly held that any authority to imprison American citizens domestically must, at a minimum, emanate from Congress, and Congress has not authorized, or established any parameters for, such a scheme of detention.

If the Court were to grant the Petition and find that the President had such a power to detain, it also must determine the circumstances and limits under which the President's asserted power may be exercised, and whether and how an individual may challenge the President's claim he is an "enemy combatant." Astoundingly, the Government asserts it may hold Padilla indefinitely so long as it produces "some evidence" – which it has defined as "*any* evidence in the record that *could* support the conclusion" – that Padilla is an undefined "enemy combatant."[1] The Government also has argued that Padilla has no need for, or right to, counsel to challenge this unprecedentedly minimal showing, and it contends that even allowing Padilla to consult with counsel would upset the "sense

[1] Opening Br. of United States as Resp.-Appellant, *Padilla v. Rumsfeld*, No. 03-2235, at 48 (2d Cir. filed July 22, 2003) (emphasis added).

of dependency" the Government's "interrogators are attempting to create" with Padilla.[2] Any consideration by this Court of the President's authority to detain must include review of whether, and pursuant to what process, the Executive may continue to hold Padilla after 20 months of imprisonment and interrogation.

The Court also should decline to review the Government's second question, which concerns whether Secretary Rumsfeld is a "proper respondent" and subject to service of process in New York. These are not the questions of national importance for which the Solicitor General seeks to have this case heard on an expedited basis. The Government's argument would allow the Executive to hand-pick the place where challenges to its authority may be heard, and it ignores the last 40 years of this Court's habeas jurisprudence. Padilla's habeas petition was filed in New York because the *Government* chose to bring Padilla there on a material witness warrant; because counsel was appointed for and consulted with Padilla in New York; and because the *Government* (through Secretary Rumsfeld), two days before a hearing on counsel's motion challenging Padilla's detention, sent military personnel to New York to seize Padilla from the federal marshals holding him in a federal detention center in New York.

The procedural issues raised in the Petition do not concern the power of the courts to hear this case; the Government concedes that habeas jurisdiction exists. *Every* judge to consider these issues, including Judge Wesley (otherwise dissenting in part) and Chief District Judge Mukasey, has agreed that Secretary Rumsfeld is a proper respondent and subject to suit in New York. These rulings, narrowly crafted to the unique facts of this case, are squarely in line with prior

[2] *See* Jacoby Decl. at 8-9, *quoted in Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 50 (S.D.N.Y. 2003).

decisions of this Court. Accordingly, this case is not an appropriate vehicle for considering broader questions of procedure in habeas cases, particularly on the expedited schedule sought by the Solicitor General.

For these reasons, the Petition should be denied. Alternatively, if the Petition is granted, the Court should consider on an expedited basis the questions presented as restated by respondent.

1. Padilla was arrested by civilian federal law enforcement agents at Chicago O'Hare International Airport, pursuant to a grand jury material witness warrant issued in the Southern District of New York, as he stepped off a regular commercial flight on May 8, 2002. Pet. App. 77a. Padilla was not carrying any weapons or explosives. *Id.* 4a. The Government alleges Padilla had discussions with al Queda members regarding a potential plot to set off a "dirty bomb" at some undetermined future time and place. The Government transported Padilla to the federal detention facility within the Southern District of New York, where he was held without bail. *Id.* 77a. As the Court of Appeals found, once Padilla was in the custody of federal marshals, "[a]ny immediate threat he posed to national security had effectively been neutralized." *Id.* 4a.

On May 15, 2002, the District Court appointed Donna R. Newman to represent Padilla. Newman met with Padilla numerous times. *Id.* 5a. On May 22, Newman filed a motion challenging the material witness warrant. *Id.* By June 7, the motion had been briefed and a hearing was scheduled for June 11. *Id.* However, two days before the hearing, the President signed an order "To the Secretary of Defense" declaring Padilla to be an "enemy combatant" and asserting that it was "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.* 57a-58a. The Secretary then sent military personnel to New

York to seize Padilla, and he chose to have Padilla imprisoned and interrogated at a military base in South Carolina. At the scheduled June 11 conference, Newman filed a habeas petition on Padilla's behalf, as "next friend."[3]

On December 4, 2002, the District Court ruled that Newman could serve as next friend for Padilla and that, given the unique facts of the case, Secretary Rumsfeld was a proper respondent and subject to suit in the Southern District of New York. The District Court held that the President had the authority to detain Padilla without criminal trial, but that Padilla was entitled to present facts to rebut the Government's claim that he was an "enemy combatant." However, the court held that "to resolve the issue of whether Padilla was lawfully detained," the court would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Id.* 166a. The District Court also ruled that Padilla "may consult with counsel in aid of pursuing this petition," in a manner respective of national security concerns. *Id.*; *see also id.* 152a-155a.

2. Seeking to avoid even that minimal challenge to the President's authority, the Government sought an interlocutory appeal. The appeal was certified (including questions presented by Padilla), and the Court of Appeals issued its decision on December 18, 2003. *Id.* 1a.

a. At the outset, the court unanimously affirmed the District Court on several preliminary issues, including those raised by the Government here concerning location of suit. *See id.* 61a n.32 (Wesley, J., concurring that Secretary Rumsfeld is an appropriate respondent and that the District Court had personal jurisdiction over the Secretary).

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[3] The petition was amended on June 19, 2002.

First, the court found that Newman had next friend standing, a finding the Government does not challenge here.

Second, the court affirmed the District Court's ruling that, on the unusual facts of this case, Secretary Rumsfeld was a proper respondent. The court relied heavily on decisions of this Court that have recognized that the proper respondent in a habeas case is not always the petitioner's immediate custodian. *Id.* 15a-20a. *See, e.g., Ex parte Endo*, 323 U.S. 283, 304-06 (1944); *Strait v. Laird*, 406 U.S. 341, 344 (1972) (habeas petition could proceed in California even though named and proper respondent, petitioner's commanding officer, located in Indiana); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (habeas petition could proceed in Kentucky even though petitioner in custody in Alabama).

Third, the court found that it had jurisdiction over Secretary Rumsfeld because he was amenable to the court's process under the New York long-arm statute, and, under controlling precedent of this Court, "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction.'" *Braden*, 410 U.S. at 495, *quoted at* Pet. App. 22a; *see also Ex parte Endo*, 323 U.S. at 307 (habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process."). The court found that Secretary Rumsfeld could be reached under the New York long-arm statute because he had "purposeful contacts" with the district that were "substantially related to the claims asserted by Padilla." Pet. App. 26a.

b. On the merits, the Court of Appeals considered carefully and at length the unique issue presented in this case concerning the asserted power of the President to imprison as an "enemy combatant" an American citizen seized in the domestic arena, on American soil outside a zone of combat. Ultimately, the court ruled that any authority to detain citizens

in these circumstances must emanate from Congress, and cannot be exercised by the President alone. Thus, the court held only that "clear congressional authorization" is required for "detentions of American citizens on American soil," and that such authorization is lacking here. *Id.* 2a. At bottom, therefore, the court's decision does not concern the ability of the *Government* to combat terrorism; at least at the outset, the issue here is purely one of *executive* versus *legislative* power, with regard to an unquestionably novel and momentous attempt to imprison citizens in the domestic arena for indefinite and extended periods without any charges or trial. As the Court of Appeals summarized at the outset of its opinion:

> As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Id. The court noted "if the President believes [his] authority to be insufficient, he can ask Congress – which has shown its responsiveness – to authorize additional powers." *Id.* 55a.

i. The court began its analysis by carefully limiting its decision to "an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States." *Id.* 27a. The court noted that Padilla carried no weapons or explosives at the time of his initial arrest, *id.* 4a, and already was locked up in a civilian maximum security detention center at the time of his seizure by

the military, *id.* 42a n.27. In light of these facts, the court emphasized that the case simply did not involve "issues concerning imminent danger" or the President's authority "to detain a terrorist in the face of imminent attack." *Id.*

Nor did the court question the Government's assertion that the United States is at war with al Qaeda. *Id.* 30a. Rather, the court analyzed the case *assuming* a state of war, using the separation of powers' framework announced in the wartime context of the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* Pet. App. 28a (citing *Youngstown*, 343 U.S. at 585 (majority op.); *id.* at 635-38 (Jackson, J., concurring)). The Court of Appeals noted that "separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere," because the Constitution dictates that "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'" Pet. App. 32a (quoting *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring)).

The Court of Appeals acknowledged that the "Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times," but it found that "the Constitution lodges these powers with Congress, not the President." Pet. App. 35a. Specifically, the court emphasized that the Constitution vests Congress with the power to define and punish offenses against the law of nations, U.S. Const. art. I, § 8, cl. 10; with the power to suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. art. I, § 9, cl. 2; and with the power to make laws providing for quartering of soldiers in private homes in time of war, U.S. Const. amend. III. *See* Pet. App. 34a-36a. In sum, the court emphasized that *Congress* is given the primary power to determine the impact of war in the domestic arena.

ii. Considering next the question whether Congress has authorized the President to seize citizens domestically as "enemy combatants," the court found that Congress in fact has expressly *forbidden* it. The court emphasized that Congress has provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This statute, which the court referred to as the Non-Detention Act, repealed the earlier Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-826, which had allowed detention of spies and saboteurs in case of invasion, war, or insurrection. Pet. App. 44a. The court found that a primary purpose of the Non-Detention Act was to prevent recurrence of situations like the Japanese internment camps of World War II, which had been established by the Executive in the context of a declared war. *Id.* 47a. Based on the language and legislative history of the Act, and this Court's prior interpretation of it, the court concluded that "the Act applies to all detentions and that precise and specific language authorizing the detention of American citizens is required to override its prohibition." *Id.*

The court's conclusion that § 4001(a) required a clear congressional authorization to detain was reinforced by this Court's decision in *Ex parte Endo*, which suggested that the Constitution itself requires that, when evaluating abridgements of civil liberties claimed to be necessary because of the exigencies of war, "[w]e must assume . . . that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex parte Endo*, 323 U.S. at 300, *quoted at* Pet. App. 52a.

The court found that neither of the acts of Congress on which the Government relied contained clear and unmistakable language authorizing the detention of American citizens on American soil outside a zone of combat. The court found that the "plain language" of the Joint Resolution Authorizing the

Use of Military Force against the perpetrators of September 11 attacks "contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by 4001(a) and the 'clear,' 'unmistakable' language required by *Endo*." Pet. App. 52a. Similarly, the court rejected the argument that Padilla's detention was authorized by 10 U.S.C. § 956(5), which allows the expenditure of funds for the maintenance of prisoners of war and other military detainees. The court found that this statute was "devoid of language 'clearly' and 'unmistakably' authorizing the detention of American citizens" captured in the United States outside a zone of combat. Pet. App. 54a.

The court noted that its holding on authority "effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof." *Id.* 4a n.1. Judge Wesley dissented in part; however, as explained further below, he viewed "the real weakness of the government's appeal" to be its contention that the President had the authority to detain Padilla indefinitely without affording him a "serious opportunity to put the government to its proof by an appropriate standard," assisted by counsel. *Id.* 74a, 75a.

REASONS TO DENY THE PETITION

The President's assertion in this case of a novel and unchecked power to imprison American citizens as "enemy combatants" is unarguably of great national significance. Nevertheless, this Court's review is not warranted at this time. The decision of the Court of Appeals was correct, and, due to the peculiar facts of this case and the narrowness of the court's decision, the case is not an appropriate vehicle for resolving broader questions related to the scope of the President's detention authority. Similarly, the Court of Appeals' fact-based ruling, narrowly tailored to this case, that Secretary Rumsfeld

is a proper respondent and subject to suit in New York does not present an important question for this Court.

A. Review By This Court Is Not Warranted Because The Court Of Appeals' Holding On The Scope Of The President's Authority Was Both Correct And Narrow.

1. The Court of Appeals Correctly Held that Both the Constitution and Section 4001(a) Require that the Military Detention of American Citizens on American Soil Must Be Supported by Clear and Unmistakable Congressional Authorization.

The Court of Appeals correctly held that both the Constitution and the Non-Detention Act, 18 U.S.C. § 4001(a), require a clear statement of congressional intent to authorize military detentions in the domestic arena. The court reviewed at length numerous constitutional provisions, as well as decisions of this Court, that make clear that the Framers gave *Congress* the power to determine the impact of war in the domestic arena. *See* Pet. App. 31a-36a, 51a-52a; *Ex parte Endo*, 323 U.S. at 298-300. Indeed, based on experience with the British monarchy, the Framers viewed the arbitrary detention of individuals by the Executive as a particular danger. This concern is expressed in several different constitutional provisions, including the Habeas Suspension Clause and the Due Process Clause of the Fifth Amendment.[4] The Habeas Suspension Clause clearly contemplates that "Rebellion or Invasion" might render military detention without criminal trial necessary for some time. *See* U.S. Const. art. I, § 9, cl. 2. By placing the Suspension Clause in Article I, however, the Framers vested *Congress*, not the President, with the power to authorize detentions without trial in those very limited

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[4] The procedural safeguards of the Fourth, Fifth and Sixth Amendments are also reflective of this concern.

circumstances. *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807).[5]

The command of the Due Process Clause that no person "be deprived of life, liberty, or property, without due process of law" also requires that detentions be pursuant to positive, specific law. The Clause is an expression of the legal principle established with the Magna Carta that "the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful." 3 William Blackstone, Commentaries *133. In our system of government, the task of making laws – including laws defining the times, causes, and extent of permissible imprisonment – rests with the Legislature, not the President. *See Youngstown*, 343 U.S. at 587; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).[6]

Contrary to the Government's claim, Pet. 17-18, the Non-Detention Act also was clearly intended to encompass detention of persons like Padilla. As the Court of Appeals found, the statute's plain language is unequivocal: "*No* citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphasis added); *see also Howe v. Smith*, 452 U.S. 473, 479

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[5] Because of the importance of habeas corpus in our constitutional scheme, long-standing tradition requires an exceptionally clear statement of congressional intent to repeal or limit habeas jurisdiction. *See, e.g. INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction.").

[6] This Court has repeatedly rejected Executive Branch efforts to invade the liberty of American citizens without congressional authorization, even in the name of national security. *See United States v. United States Dist. Court*, 407 U.S. 297, 323-24 (1972); *New York Times Co. v. United States*, 403 U.S. 713, 719-20 (1971); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936).

n.3 (1981) (characterizing § 4001(a) as "proscribing detention *of any kind* by the United States") (emphasis in original). The Non-Detention Act repealed a statute that specifically concerned detention of spies and saboteurs in time of war, invasion or "insurrection within the United States in aid of a foreign enemy." 50 U.S.C. § 812(a) (1970); *see* Pet. App. 44a. Moreover, "the manifest congressional concern" about the wartime detention of Japanese Americans demonstrates "that section 4001(a) limits military as well as civilian detentions." Pet. App. 47a. The Court of Appeals was correct in concluding that Congress intended that only "precise and specific language authorizing detention" would satisfy § 4001(a). Interpreting a general declaration of war or authorization for the use of force to implicitly authorize domestic detentions would vitiate the statute's core purpose of requiring the sort of public deliberation and accountability *on the specific issue of detention during a war* that was so lacking with the Japanese internment camps.[7]

Also contrary to the Government's assertion, Pet. 17-18, the canon of constitutional avoidance does not compel a reading of the Non-Detention Act that permits domestic military detentions without congressional authorization. Not only is such a construction incompatible with the statute's plain language, the Government's avoidance argument assumes the answer to the constitutional question that it seeks to avoid, namely that the President's Commander-in-Chief powers preempt the field and leave no room for congressional action – a doubtful conclusion at best. *See Youngstown*, 343 U.S. at 644

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[7] The Non-Detention Act would not have achieved its purpose of preventing a recurrence of the Japanese internment camps if it could be satisfied by a mere declaration of war or authorization for use of military force, for there had been such a congressional declaration of war at the time of the Japanese internment camps themselves.

(Jackson, J., concurring) ("Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."). In addition, the Government's proposed construction raises at least as many constitutional questions as it avoids, because the military detention scheme the Executive proposes would raise serious questions under the Habeas Suspension Clause and the Fourth, Fifth and Sixth Amendments – questions that were fully raised and briefed below. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (holding that Constitution categorically prohibits "'laws and usages of war'" from being "applied to citizens in states . . . where the courts are open and their process unobstructed"). Indeed, the doctrine of constitutional avoidance counsels in favor of a requirement of clear congressional authorization for detentions to avoid unnecessarily resolving such questions.

2. The Court of Appeals Correctly Found that Congress Has Not Clearly and Unmistakably Authorized Padilla's Detention.

Neither of the congressional enactments on which the Government relies mention "enemy combatants," let alone provide the sort of clear authorization for detention that the Constitution and § 4001(a) demand. Congress's September 18, 2001 Authorization for Use of Military Force (AUMF) provides the President with authority to use "necessary and appropriate force" by deploying American military forces.[8] Its language simply cannot be read to authorize silently that which

[8] The AUMF provides: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2, 115 Stat. 224 (Sept. 18, 2001).

Congress explicitly rejected in § 4001(a): the indefinite detention without charge of an unarmed American citizen seized outside a zone of combat. As the Court of Appeals pointed out, although Congress took pains to specify that the AUMF was intended to satisfy the War Powers Act, it nowhere mentions an intent to satisfy § 4001(a). Pet. App. 53a. In short, neither the text nor legislative history[9] of the AUMF mentions any sort of power to detain – let alone the awesome and unprecedented power the Government seeks to exercise here.[10]

Nor does the spending authorization in 10 U.S.C. § 965(5) authorize any particular sort of detention. In *Ex parte Endo*, the Executive similarly argued that an appropriations statute funding the War Relocation Authority (WRA) had implicitly ratified the WRA's detention of Japanese Americans, and this Court rejected the argument in no uncertain terms. *See* 323 U.S. at 303 n.24 (citations omitted). Here the claim of authorization is even weaker. 10 U.S.C. § 956 does not mention "enemy combatants," let alone "plainly show a purpose to bestow the precise authority" on the Executive to detain without charge Americans seized on American soil.

[9] Shortly after the September 11 attacks, the same Congress that passed AUMF passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gives the Executive authority to detain without charge aliens suspected of terrorist ties for short periods of time before initiation of criminal or removal proceedings. 8 U.S.C. § 1226a(a).. The limitations in the Patriot Act prove that Congress had not, in the AUMF, already delegated to the Executive unfettered discretion to detain *anyone*, *indefinitely*, without charge.

[10] Nor has the President made an explicit determination or showing, backed by evidence, that Padilla even fits within the terms of the AUMF, namely that he "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

3. Neither the Commander-in-Chief Clause, Historical Practice, Nor This Court's decision in *Ex parte Quirin* Provide Authority for Padilla's Detention.

The Commander-in-Chief Clause does not give the President authority to detain American citizens on American soil outside a zone of combat. As even the Framers' most enthusiastic advocate of a strong Executive observed, the Executive's powers as Commander-in-Chief "amount to nothing more than the supreme command and direction of the military and naval forces. . . ." The Federalist No. 69, at 418 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). Even in wartime, the President must share his powers with Congress:

> [T]he Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. . . . That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.

Youngstown, 343 U.S. at 643-44 (Jackson, J., concurring).

Without doubt, in every war our military forces have seized prisoners of war on the battlefield. But there is a profound difference between the historical practice of detention of prisoners of war on the field of battle, and the new power the President claims here to deem the entire nation a battlefield in which any person may be seized and held without trial for the indefinite future. The risk of error, and the potential for abuse, are much greater in this new context, for the Executive's novel argument would allow it to exile any citizen from the protection of our Constitution and laws simply through the artifice of labeling him – without any visible standards – as an "enemy combatant." The Government's citations of "cases upholding

broad powers in military commanders engaged in day-to-day fighting in a theater of war" are thus unavailing. *Youngstown*, 343 U.S. at 587.

In large measure, the Government's argument about the propriety of Padilla's detention rests on a single foundation: some dicta in *Ex parte Quirin*, 317 U.S. 1 (1942). But *Quirin* cannot support the weight that the Government asks it to bear. *Quirin* is distinguishable from the case at hand on several important grounds. "First, and most importantly, the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war." Pet. App. 37a. Here, by contrast, there is no express congressional authorization, and Padilla is being held without any sort of trial at all. "Second, the petitioners in *Quirin* admitted that they were soldiers" in the German Army, and so the "*Quirin* Court deemed it unecessary to consider the dispositive issue here – the boundaries of the Executive's military jurisdiction – because the *Quirin* petitioners 'upon the conceded facts, were plainly within those boundaries.'" Pet. App. 39a (quoting 317 U.S. at 46). Third, *Quirin* was decided prior to the enactment of § 4001(a). Finally, this Court in *Quirin* went out of its way to caution that it had "no occasion now to define with meticulous care the ultimate boundaries" of military jurisdiction nor to consider the President's powers in the absence of Congressional legislation. 317 U.S. at 29, 45-46. *Quirin* thus provides no support for Padilla's detention.

B. Review Is Not Warranted Because The Narrow Holding Below Does Not Compromise The President's Ability To Preserve National Security In Time Of War.

Not only was the Court of Appeals correct in holding that the President lacked the authority to detain Padilla as an "enemy combatant," the peculiar facts of this case and the

narrowness of the decision both counsel against review. As noted previously, this case simply does not involve the President's "authority to detain a terrorist in the face of imminent attack," Pet. App. 42a n.27; Padilla was unarmed and not engaged in imminent hostilities when initially arrested, and already incarcerated in a maximum security prison by the time he was seized by the military.

This case does not involve judicial interference with the President's decisions on the battlefield; short of declaring the entire world a combat zone in which the President's war powers trump normal legal rules, the government cannot contend that either Chicago O'Hare airport or the Metropolitan Correctional Center were zones of combat. Indeed, the case is not even a good vehicle for resolving the application of the AUMF, for the Government has not even alleged sufficient facts to bring Padilla within the text of the statute, insofar as it does not claim that Padilla "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person."

Finally, the Court of Appeals did not require Padilla's immediate release. It allowed Padilla to be transferred to civilian authorities for criminal trial or grand jury proceedings. Moreover, the court advised that if the President viewed these alternatives as inadequate, he could seek additional authority from Congress. This case does not involve a situation where the President must act immediately to respond to an emergency and lacks time to seek congressional authorization; Congress is open and operating, and if current laws are insufficient to deal with the threat of global terrorism, it is up to Congress – in the first instance – to enact new laws to deal with the threat.

C. Any Authority The President May Have Does Not Allow Him To Continue To Imprison Padilla.

The Court should deny the Petition for the reasons set forth above. Any consideration, however, of the President's authority to imprison American citizens domestically as "enemy combatants" must also include consideration of the circumstances and limits under which the President's asserted power may be exercised, and whether and how an individual may challenge the President's claim he is an "enemy combatant." *Every* judge who has considered this case has agreed that the President does *not* have the authority claimed by the Government – an authority to imprison an individual indefinitely, without ever affording him a meaningful opportunity, with the assistance of counsel, to challenge his detention.

The Government's assertion of Executive power in this case is raw and stark. After 20 months, the Government has not brought any charges against Padilla stemming from his alleged participation in a plot to commit a terrorist act. It appears the Executive seeks to imprison Padilla simply to incapacitate him as a possible threat or, more tellingly, to interrogate him further for potential intelligence. Apparently, after 20 months, Padilla still has not become sufficiently "dependent" on his captors to yield all the Government wants, or believes he has, and so his isolation and interrogation continue. It is difficult to imagine a closer parallel to one of the greatest fears of our founding patriots. As Madison wrote in Federalist No. 47, *supra* 16, at 301, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny"; *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and

lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.").[11]

In order to test whether Padilla was, and remains, "lawfully detained on the facts present here," Pet. App. 166a, Chief Judge Mukasey ruled that Padilla has a right to challenge his detention with the assistance of counsel. *Id.* 142a-155a. The court stated that Padilla's need to consult with a lawyer was "obvious" given that "[h]e is held incommunicado at a military facility," and that Padilla's right to challenge the President's authority to detain him "will be destroyed utterly if he is not allowed to consult with counsel." *Id.* 147a-148a, 153a.

The Government challenged this ruling on appeal, contending that Padilla could be detained without any right to present evidence or have access to counsel to challenge the President's authority to detain him. Padilla also challenged rulings of the District Court, including the court's determination that the government need present only "some evidence" to imprison Padilla as an "enemy combatant," *Id.* 162a, 166a.

As set forth above, the Court of Appeals' ruling on the merits effectively rendered these issues moot. *Id.* 4a n.1. In dissent, however, Judge Wesley found that "the real weakness of the government's appeal" was its response to Padilla's asserted right to challenge his detention. *Id.* 74a. As described by Judge Wesley, "[t]he government contends that Mr. Padilla

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[11] Winston Churchill reiterated in 1943: "The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers is in the highest degree odious, and is the foundation of all totalitarian government whether Nazi or Communist." *See* A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* 391 (1992).

can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard." *Id.* Judge Wesley squarely rejected that view, finding that Padilla was entitled to a hearing where, "assisted by counsel, [he] would be able to contest whether he is actually an enemy combatant. . . ." *Id.* 75a.

Judge Wesley raised central questions concerning the scope and conditions of the President's power to detain Padilla as an "enemy combatant":

> One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control.

Id. (citations omitted). Judge Wesley concluded that, in our constitutional government, Padilla's claims are entitled to "careful and thoughtful attention and are examined not in the light of his cause – whatever it may be – but by the constitutional and statutory validity of the powers invoked against him." *Id.*

Should the Court grant review in this case, these questions concerning the manner in which the President's asserted power may be exercised must also be considered. Even the "plenary powers" of the Executive and Legislative Branches are "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose "a constitutionally permissible means of implementing" its power). In *Zadvydas*,

in order to avoid the serious constitutional question presented by an *indefinite* detention of removable aliens, this Court construed a statute authorizing detention "to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review." 533 U.S. at 682.

Similarly, if the President has any authority in the domestic arena to imprison citizens as "enemy combatants," it is necessary to determine the limits of that authority and how it may be exercised. As Judge Wesley noted, Padilla's detention "is undefined by statute or Presidential Order." Pet. App. 75a. No standards exist regarding how long, and for what reasons, Padilla may be imprisoned. These issues must be addressed before any judgment can be made regarding the correctness of the Court of Appeals' ultimate holding that, after 20 months of solitary confinement, Padilla either must be charged with a crime, detained as a material witness, or released. *Id.* 55a.

As both Judge Wesley and Chief Judge Mukasey recognized, Padilla's right to challenge by writ of habeas corpus the President's assertion of authority to detain him is "meaningless" and "will be destroyed utterly" without access to counsel. Pet. App. 75a, 153a. For over 20 months and continuing to this day, Padilla has been held by the President incommunicado. "[W]here the defendant . . . is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Powell v. Alabama*, 287 U.S. 45, 65 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

Similarly, the right to challenge whether Padilla was, and remains, "lawfully detained on the facts present here," Pet. App. 166a, requires that Padilla be afforded a "serious opportunity to put the government to its proof by an appropriate standard." *See id.* 74a (Wesley, J., concurring in part,

dissenting in part). Whether Padilla is today an "enemy combatant" is a "jurisdictional fact" critical to the President's asserted power to imprison him without trial. This Court has recognized that courts have both the authority and the obligation to make a threshold, *de novo* determination of jurisdictional facts critical to an exercise of authority. *See, e.g.*, *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also Burns v. Wilson*, 346 U.S. 137, 142-43 (1953) (plurality op.). And the Court repeatedly has held that an extended deprivation of liberty cannot be sustained on a showing of less than "clear and convincing evidence." *See United States v. Salerno*, 481 U.S. 739, 750 (1987); *Addington v. Texas*, 441 U.S. 418, 427 (1979).

If the Court grants review in this case, these issues concerning the exercise of the President's power to detain must also be heard, and heard now. It would be fundamentally unfair to Padilla to remand these issues to the Court of Appeals for yet more rounds of proceedings. For the reasons set forth above, however, this Court need not review in this case the wholly proper determination of the Court of Appeals that, after almost 20 months of solitary confinement, Padilla either must be charged with a crime, held as a material witness, or released. No other conclusion comports with the fundamental rule of law on which this country is based.

D. There Are No Compelling Reasons For This Court To Review The Court Of Appeals' Correct Rulings That Secretary Rumsfeld Is A Proper Respondent And Subject To Suit In New York.

The Court of Appeals followed settled precedent of this Court in affirming, unanimously, the District Court's rulings that Secretary Rumsfeld is a proper respondent to Padilla's habeas petition and subject to personal jurisdiction through

New York's long-arm statute. *See* Pet. App. 13a-26a, 61a n.32. In any event, these fact-based determinations do not present an important question; they do not conflict with any other circuit decision in an analogous case; and they do not warrant review on the expedited schedule sought here.

1. At the outset, the issues raised by the Government do not concern the power of the District Court, or of this Court, to resolve this case (and the Government does not suggest otherwise). The Government concedes that Padilla's habeas petition may be heard in a district court of the United States; the issue it raises is *which* district court, and whether that court had personal jurisdiction over Secretary Rumsfeld. *See* Pet. 11 ("[This] case should have proceeded in a different district court in a different circuit."). Courts routinely have held that these issues do not involve the power of the court to hear the case. *See, e.g., Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000) (rejecting "out of hand" argument that, if Attorney General was not proper respondent, court would lack subject matter jurisdiction, and viewing issue instead as one involving personal jurisdiction); *West v. Louisiana*, 478 F.2d 1026, 1029 (5th Cir. 1973) ("[f]ailure to name a proper respondent is a procedural rather than a jurisdictional defect"), *adhered to en banc*, 510 F.2d 363, 363 (5th Cir. 1975); 17A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 4268.1 (2d ed. 1988).

2. The Government contends that the Court of Appeals ignored the language of 28 U.S.C. §§ 2242 and 2243, which it interprets as expressly limiting the proper respondent in a habeas proceeding to the petitioner's immediate custodian.[12]

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[12] Section 2242 provides that a habeas application shall include "the name of the person who has custody over him." 28 U.S.C. § 2242. Section 2243 similarly provides that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243; *see also* Fed. R. Civ. P. 81(a)(2).

The Government's argument is based on formalistic, territorial notions of jurisdiction that, as the Court of Appeals found, this Court rejected long ago. *See* Pet. App. 14a-21a. To be sure, in the vast majority of cases, the proper respondent in a habeas petition will be the warden of the prison in which the petitioner is incarcerated. *See, e.g., Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir 1945). But this Court has also recognized that the concept of "custodian [is] sufficiently broad" to take into account practical realities that may make it inappropriate to require litigation in the place where the immediate physical custodian is located. *Strait v. Laird*, 406 U.S. at 345-46.

Thus, in *Strait*, the Court allowed litigation to proceed in California even though the proper respondent and actual custodian was located in Indiana. *Id.* at 344.[13] And in *Braden v. 30th Judicial Circuit Court*, this Court allowed a prisoner incarcerated in Alabama to name a Kentucky court as his custodian. 410 U.S. at 495. These cases, as well as others cited by the Court of Appeals in which this Court has allowed someone other than the immediate custodian to be named in a habeas petition, *see* Pet. App. 19a n.15, demonstrate that this Court has never adopted the rigid formalistic rule claimed by the Government.

The Government would distinguish these cases as involving "anomalous situations" that have no bearing on a "traditional" habeas action. Pet. 24-25. Yet this case is hardly "traditional," but rather an unprecedented one that demands the

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[13] The government contends that *Strait* is inapposite because the petitioner was not physically detained. Pet. 25 n.12. The lack of physical detention, however, was not cited as relevant to *Strait*'s reasoning. The petitioner in *Strait* was in custody for purposes of the habeas statute, and the Court held the litigation could continue in a place other than where the petitioner's "custodian" was located. Both the holding and the reasoning of *Strait* fully support the decision below.

same practical reasoning this Court applied in cases like *Braden* and *Strait*.

In any event, this case is wholly fact-bound and unique, and these issues do not warrant review by this Court on an expedited schedule. The *Government* chose to bring Padilla to the Southern District of New York. Counsel was appointed there. Upon order of the President, the Secretary then sent military personnel to New York to take Padilla into an unprecedented, domestic military confinement. The Secretary chose to move Padilla to a military base in South Carolina and may transfer Padilla wherever he wants within the military command. Commander Marr, the ostensible custodian in South Carolina, has no independent authority over Padilla or relevance to the circumstances of his detention. It is the Secretary who has the exclusive power to decide whether or when Padilla's detention will terminate. Unless the domestic seizure of citizens by the military is to become commonplace (or at least until it does), there is no reason for this Court to decide whether the Court of Appeals was correct to follow *Braden* and *Strait* or whether to adopt a new highly-formalistic, strictly-territorial view that would give the Government unprecedented additional powers to dictate the forum where all challenges to its "military seizure authority" may be heard.

Although the Government suggests the decision in this case is at odds with the rulings of other circuit courts, Pet. 22, the courts below correctly found that the circumstances of Padilla's detention presented a unique factual and legal setting on which no circuit court has ever passed. *See* Pet. App. 105a (emphasizing "unprecedented" level of personal involvement by a Cabinet-level officer and that "neither side, and no amicus, has cited a case even remotely similar in this respect."); *id.* 21a (declining to articulate a general rule; "[w]e only hold that,

here, Secretary Rumsfeld is the proper respondent."). Thus, there is no "circuit split" for this Court to resolve.[14]

3. Similarly, every judge below was in agreement that the District Court had personal jurisdiction over the Secretary by virtue of New York's long-arm statute, and there is no compelling reason for this Court to consider that issue either.[15] In *Braden*, this Court could not have been clearer that "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' . . . even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden*, 410 U.S. at 495; *see also Strait*, 406 U.S. at 344 (distinguishing decision in *Schlanger v. Seamans*, 401 U.S. 487 (1971), on the ground that the jurisdictional defect in *Schlanger* was "the total lack of formal contacts between Schlanger and the military in that district").

The unique facts set forth above eliminate any doubt that the Court of Appeals properly determined that personal jurisdiction existed over Secretary Rumsfeld in New York. And those same facts dispel any notion that the court has sanctioned an approach that would "vest virtually every district

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[14] The district court decision in *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), decided before the Court of Appeals' decision here, certainly does not create a circuit split, and, in any event, the court expressly decided that case on *venue* grounds, and distinguished *Padilla* because lead counsel for *Al-Marri* had no connection to the district. *Id.* at 1005 n.1, 1008. Here, the Government has *not* pursued its venue challenge and therefore has waived the argument. *Compare* Pet. App. 117a *with* Pet. App. 10a n.6 & 10a-26a. In addition, courts that have espoused an "immediate custodian" rule for routine habeas cases have recognized that an exception may be appropriate in an unusual case. *See, e.g., Vasquez*, 233 F.3d at 696; *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986).

[15] Section 2241(a) provides that "[w]rits of habeas corpus may be granted by . . . the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a).

court in the country with habeas jurisdiction over the amended petition." Pet. 12. Thus, the Government's fears of "forum shopping" are completely unfounded and, indeed, wholly disingenuous here. It is the *Government* that seeks to reserve to itself an unparalleled ability to dictate the forum where challenges to its authority will be heard. And even if it were possible for the Secretary to be served in a district that had no connection to this case, the rules of transfer are adequate to assure that the litigation takes place in an appropriate venue. Pet. App. 117a.

Contrary to the government's contentions, there is nothing in section 2241(a)'s statement that habeas writs may be "granted by the . . . district courts . . . within their respective jurisdictions" that suggests that only a *single* district court could have jurisdiction to grant the writ. No one suggests that a district court may authorize a writ beyond its "respective jurisdiction." Instead, the relevant question is *how* the scope of its respective jurisdiction is determined, and this Court, in a line of cases culminating in *Braden*, has made clear that it is determined by the limits of service of process. *See Braden*, 410 U.S. at 495.

Nor can other statutory language that speaks of "the" district court having power to issue the writ, *see* 28 U.S.C. § 2241(b), be read to mean that in every case there must be only one court that potentially has jurisdiction over the custodian. As the Government itself recognizes, other habeas provisions clearly provide that multiple district courts may have jurisdiction over habeas petitions under certain circumstances. *See* 28 U.S.C. § 2241(d). The Government suggests that these provisions are an exception to a supposed single district rule. Pet. 27. But just as section 2241(d) envisions the possibility of concurrent jurisdiction, so does the "respective jurisdictions" language of section 2241(a), as authoritatively interpreted by this Court in *Braden*. In short, it is the Government's position,

and not the lower courts' ruling, that is in conflict with prior decisions of this Court.

The Government has failed to pursue any argument that venue is improper, *see* n.14, *supra*, or that New York's long-arm statute does not reach petitioner. At bottom, this unprecedented, fact-bound case is not an appropriate vehicle for reconsidering broad questions of procedure in habeas cases, particularly on the expedited schedule sought by the Solicitor General.

E. Respondent Concurs That The Court Should Not Hold The Petition Pending Its Disposition In *Hamdi*.

Respondent concurs with the Government that the Court should grant the Petition rather than hold it pending the Court's decision in *Hamdi v. Rumsfeld*, No. 03-6696, 124 S. Ct. 981 (cert. granted Jan. 9, 2004). *Hamdi*'s resolution likely will not be dispositive of Padilla's habeas petition, as the two cases raise fundamentally different issues: Padilla was detained on American soil, while Hamdi was captured fighting on a foreign battlefield. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) ("To compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.") (Wilkinson, J., concurring); *Hamdi v. Rumsfeld*, 316 F.3d 450, 459, 465 (4th Cir. 2003). Padilla already has been held for almost 20 months. It would be an unjustified hardship to force him to wait further for what likely would be post-*Hamdi* proceedings to determine his rights.

CONCLUSION

Respondent respectfully submits that the Petition should be denied. Alternatively, if certiorari is granted, the Court's review should be limited to the two questions presented as restated by respondent. If certiorari is granted, respondent respectfully requests expedited consideration, in the manner proposed by the Solicitor General.

Respectfully submitted,

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